No. 90-693

In The

Supreme Court of the United States

October Term, 1990

CURTIS REED JOHNSON,

Petitioner,

vs.

HOME STATE BANK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE PETITIONER

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A. QUESTION PRESENTED FOR REVIEW

Whether the terms "debt" and "claim" as defined at 11 U.S.C. §101(11) and 11 U.S.C. §101(4), respectively, encompass the *in rem* portion of a secured debt which remains due after the discharge in a prior bankruptcy of the *in personam* portion.

B. TABLE OF CONTENTS

B. TABLE OF CONTENTS – Continued

C. TABLE OF AUTHORITIES

Page

CASES

C. TABLE OF AUTHORITIES – Continued

Page

C. TABLE OF AUTHORITIES – Continued

C. TABLE OF AUTHORITIES – Continued

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D. Opinions

The opinion of the court of appeals (Pet. pp. App. 1-App. 8) is reported at 904 F.2d 563 (10th Cir. 1990). The opinion of the district court (Pet. pp. App. 9-App. 19) is reported at 96 B.R. 326 (D.Kan. 1989). The opinion of the bankruptcy court (Pet. pp. App. 20-App. 33) is not reported.

E. Jurisdiction

The judgment of the court of appeals (Pet. pp. App. 34-App. 35) was entered on June 7, 1990. A petition for

rehearing suggestion for rehearing en banc was denied on August 1, 1990. (Pet. pp. App. 36-App. 37) The Petition for Writ of Certiorari was filed on October 26, 1990 and was granted on January 22, 1991. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

F. Statutes Involved

1. 11. U.S.C. §101(11): "debt" means liability on a claim.

2. 11 U.S.C. §101(4): "claim" means –

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

3. 11 U.S.C. §102(2): "Claim against the debtor" includes claim against property of the debtor.

G. Statement of the Case

Introduction

The Petitioner, Curtis Reed Johnson, (hereinafter "Johnson") and his wife operate a farm in Edwards

County, Kansas. In 1984, unable to pay the debt they had accumulated, they defaulted on their loan to the Respondent, the Home State Bank of Lewis, Kansas, (hereinafter "the Bank") and the Bank foreclosed. The Johnsons sought relief in bankruptcy and obtained a discharge of their *in personam* obligation to the Bank under the provisions of Chapter 7 of the United States Bankruptcy Code. After the Bank obtained relief from the automatic stay in the Chapter 7 bankruptcy proceeding, it proceeded in state court with its foreclosure action on the *in rem* liability which remained after the Chapter 7 discharge. After a sheriff's sale, the Johnsons appealed to the Kansas Supreme Court, which reversed and remanded the case to the state trial court with instructions to conduct another sheriff's sale. After the case was remanded, but before the second sale could be conducted, Johnson filed a Chapter 13 bankruptcy. The bankruptcy court confirmed Johnson's amended Chapter 13 plan, the district court reversed the bankruptcy court, and the Tenth Circuit Court of Appeals affirmed the district court. This Court granted Johnson's Petition for Writ of Certiorari on January 22, 1991.

The Case

On May 1, 1978, the Johnsons executed a first mortgage to the Travelers Insurance Company (hereinafter "Travelers") covering two quarter sections of land in Edwards County, Kansas. That mortgage was not foreclosed in the foreclosure proceedings instituted by the Bank.[1]

[1] The portions of the proceeding which took place prior to the Chapter 13 filing which are not, therefore, contained in the

On June 2, 1978, the Johnsons executed a second mortgage to the Bank covering the same two quarter sections of land. The mortgage was given to secure a loan of $100,000.00 evidenced by a promissory note from the Johnsons to the Bank executed on the same date. The mortgage states that it is subject to the first mortgage to Travelers.

On February 25, 1983, the Johnsons entered into a loan agreement with the Bank. In conjunction therewith, the Johnsons executed two notes, one in the amount of $60,000.00 and the other in the amount of $310,000.00. The loans were secured by the second mortgage, security interests in farm machinery and equipment, crops, government payments, and assignments of oil and gas income.

On March 23, 1984, the Bank initiated its foreclosure action against the Johnsons in the Edwards County, Kansas District Court. At the time suit was filed, the $310,000.00 note had been reduced to approximately $260,000.00, and the $60,000.00 note had been reduced to approximately $13,000.00.

On September 7, 1984, the Johnsons executed a deed to their son and transferred ownership of one quarter section of land to him subject to the Travelers' and the Bank's mortgages. The deed was recorded on September 10, 1984.[2]

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record before the Court, have been taken from the facts found by the Kansas Supreme Court in its decision in *Home State Bank v. Johnson*, 240 Kan. 417, 418-424, 729 P.2d 1225, 1226-1230 (1986).

[2] The facts in this paragraph are not in the record or in the opinion of the Kansas Supreme Court, but are undisputed.

On October 9, 1984, the Johnsons filed a joint petition for relief under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Kansas. On April 11, 1985, the bankruptcy court discharged the Johnsons from all dischargeable debts. About the same time, the bankruptcy court entered an order granting the Bank relief from the automatic stay imposed by 11 U.S.C. §362 to proceed with foreclosure *in rem* without taking any personal judgment against the Johnsons.

On June 18, 1985, the Bank filed a motion for summary judgment in the Edwards County District Court. On October 9, 1985, the matter came before the Edwards County District Court for oral argument, at which time the court granted the Bank's motion. The court ordered the sheriff to sell the real property which was the subject of the Bank's mortgage subject to Travelers' unforeclosed first mortgage. On December 6, 1985, the sheriff filed his return on the order of sale reporting that the Bank was the highest and best bidder.

On January 7, 1986, the court took up the Bank's motion to confirm sheriff's sale and Johnsons' objection thereto. The Johnsons moved to set aside the sale claiming, among other arguments, that the Bank could only enforce the mortgage *in rem* for $100,000.00. The court overruled the Johnsons' objections and confirmed the sale.

The Johnsons perfected an appeal to the Kansas Court of Appeals, which transferred the case, upon the Johnsons' motion, to the Kansas Supreme Court. (Pet. p.

App. 22) On March 14, 1986, Travelers assigned its mortgage to the Bank.

On December 11, 1986, the Kansas Supreme Court reversed the trial court's decision which (1) foreclosed the second mortgage *in rem* without finding and stating the amount due, and (2) confirmed the sheriff's sale. The case was remanded to the trial court with directions to set aside the sheriff's sale and deed and for further proceedings in conformity with the court's opinion. *Home State Bank v. Johnson*, 240 Kan. 417, 430, 729 P.2d 1225, 1234 (1986).

On February 9, 1987, the case came before the trial court on remand. It granted the Bank judgment on its second mortgage *in rem* in the principal amount of $100,000.00 plus accrued interest. It also found that the amount remaining due on the unforeclosed first mortgage which the Bank purchased from Travelers was $100,447.42. It also granted the Bank an *in rem* judgment in the amount of $1,757.96 for taxes it paid. Lastly, the court ordered that the property be sold by the sheriff on April 13, 1987 at 10:00 a.m. (Pet. p. App. 23)

On February 24, 1987, Johnson's wife executed a quitclaim deed to her husband transferring all of her ownership interest in the real property at issue to Johnson. The deed was recorded on February 26, 1987. On February 24, 1987, Johnson's son and daughter-in-law executed a quitclaim deed to Johnson, transferring back to him all ownership they had in the quarter section of real property which had previously been transferred to Johnson's son. The deed was recorded on February 26, 1987. (Pet. p. App. 23-App. 24) At the time of the Chapter

13 filing, both quarter sections of land were owned solely by Johnson.

On March 2, 1987, Johnson filed his voluntary Chapter 13 Petition in the United States Bankruptcy Court for the District of Kansas. (R-BR 1) He scheduled the Bank as a partially secured creditor based on the journal entry filed in Edwards County District Court on remand from the Kansas Supreme Court. (R-BR 1, Chap. 13 Stmt., ques. 14a) The only other debt scheduled by Johnson was another *in rem* liability which remained due after the Johnsons' discharge in the Chapter 7 bankruptcy. (*Id.*) The Bank filed an objection to Johnson's plan on June 2, 1987. (R-BR 17)

On June 23, 1987, the bankruptcy court refused to confirm Johnson's first plan holding that it was "not confirmable for lack of feasibility under the present circumstances." (Tr., p. 108; R-BR 22) But the court allowed Johnson an opportunity to file an amended plan, which he did on July 6, 1987. (R-BR 24)

In Johnson's amended plan, he proposed to pay the Bank by tendering all monthly oil and gas royalty payments directly from the producers to the Bank. Additionally, Johnson proposed to make annual payments to the Bank on the first day of December of each year for five years beginning December 1, 1987 as follows:

1987:	$10,000.00
1988:	$32,000.00
1989:	$32,000.00
1990:	$35,000.00
1991:	$17,500.00

Lastly, Johnson proposed to pay the Bank a lump-sum payment on or before March 1, 1992 in satisfaction of the remaining amount of the Bank's claim, which Johnson projected to be $80,652.92. (R-BR 24 pp. 4-6)

On August 7, 1987, the Bank filed a detailed objection to Johnson's proposed amended plan wherein the Bank alleged, in part, that the bankruptcy court lacked personal and subject matter jurisdiction "by virtue of the Chapter 7 discharge granted [Johnson] on April 11, 1985, [in the prior Chapter 7 bankruptcy proceeding]," that the plan was not feasible, and that the plan was not submitted in good faith. (R-BR 31)

The case came before the bankruptcy court for evidentiary hearing on Johnson's amended plan on September 3, 1987. After hearing the evidence, the bankruptcy court took the case under advisement. (R-BR 34) On April 8, 1988, and bankruptcy court issued its decision confirming Johnson's amended plan. (R-BR 44; Pet. pp. App. 20-App. 33)

On April 18, 1988, the Bank filed its notice of appeal from the bankruptcy court's decision to the United States District Court for the District of Kansas. (R-BR 48)

On January 3, 1989, the district court entered its decision reversing the bankruptcy court. The district court held that Johnson's plan could not be confirmed because it improperly scheduled a debt previously discharged under Chapter 7. Having made that determination, the court specifically declined to rule on the issues of good faith and feasibility which were also raised by the Bank in the appeal. (R-DC 12; Pet. pp. App. 9-App. 19)

On February 2, 1989, Johnson filed a notice of appeal from the district court's decision to the United States Court of Appeals for the Tenth Circuit. On February 3, 1989, the Bank filed a notice of cross-appeal raising the issues of good faith and feasibility which were not ruled upon by the district court. (R-DC 14 and 15)

On February 27, 1989, the district court entered an order for stay pending appeal upon Johnson's motion. The district court ordered that the Bank was stayed from any further action against Johnson or his property in any district court of the State of Kansas and in the United States Bankruptcy Court for the District of Kansas pending resolution of the appeal to the Tenth Circuit Court of Appeals. The stay was subject to Johnson's payments to the bankruptcy trustee of adequate protection payments delineated by the court in amounts equal to the payments due under the plan of reorganization confirmed by the bankruptcy court. (R-DC 24)

Thereafter, when Johnson did not make the payments due under the previously confirmed plan, the Bank filed a motion to terminate or vacate stay pending appeal. (R-DC 25) Johnson objected to the Bank's motion stating that he was able to pay $17,000.00 in lieu of the plan payments previously ordered by the court. (R-DC 28 and 29) The court denied the Bank's motion to terminate or vacate stay pending appeal by order dated May 4, 1989. (R-DC 27)

On June 7, 1990, the court of appeals entered its decision affirming the district court. In making its decision, the court did not reach the issues of good faith and

feasibility raised by the Bank in its cross-appeal. (Pet. pp. App. 1-App. 8)

On June 21, 1990, Johnson filed a petition for rehearing and suggestion for rehearing en banc, which the court denied by order filed August 1, 1990. (R-10th Cir. 49, 54; Pet. pp. App. 34-App. 35) On August 9, 1990, the court of appeals issued its mandate. (R-10th Cir. 57)

On June 13, 1990, the Bank filed in the United States District Court a motion to disburse to the Bank the funds held by the bankruptcy trustee for the stay pending appeal. (R-DC 43) On October 1, 1990, the court overruled the Bank's motion and ordered that the remaining funds on hand with the bankruptcy trustee be used, in part, to satisfy Johnson's attorneys' fees approved by the bankruptcy court. The balance of the funds were to be held by counsel for Johnson in trust pending further order by the bankruptcy court. (R-DC 48)

On October 26, 1990, the Edwards County District Court issued an order of sale directing the sheriff to sell the real property at issue.[3] Also, on October 26, 1990, Johnson filed his Petition for Writ of Certiorari in this Court. (R-10th Cir. 62)

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[3] The facts described in this sentence are not in the record because they occurred in the foreclosure action pending in the state court after the Tenth Circuit's decision; but these facts are not disputed. They are set forth here to give the Court a full understanding of what has transpired in this case between the Tenth Circuit's decision and now, and because of the Bank's allegation that the case is moot. (Res. Supp. Brief pp. 2-3)

On November 21, 1990, Johnson filed an adversary complaint against the Bank in the bankruptcy court seeking an order enjoining the Bank from selling or attempting to sell the real property at issue pending a determination by this Court on the Petition for Writ of Certiorari. The adversary proceeding came before the bankruptcy court on November 21, 1990 on Johnson's motion for a temporary restraining order, at which time the court entered an oral order denying Johnson's motion.[4]

On November 23, 1990, Johnson filed in the Tenth Circuit Court of Appeals an emergency motion to stay the operation of its mandate pending final disposition of the Petition for Writ of Certiorari to this Court. (R-10th Cir. 60) On November 27, 1990, the court of appeals issued an order recalling its mandate and stayed issuance of the mandate pending final determination on the Petition for Writ of Certiorari. (R-10th Cir. 65) Due to the withdrawal of the mandate and the bankruptcy court's resulting loss of jurisdiction, a written order on the bankruptcy court's oral order denying Johnson's motion for a temporary restraining order in the aforedescribed adversary proceeding was not entered.[5]

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[4] The facts in this paragraph are not in the record because they occurred in the bankruptcy court after the entry of the Tenth Circuit's mandate but before the Petition for Writ of Certiorari was granted; but these facts are not disputed. They are included here because of the mootness issue raised by the Bank. (Res. Supp. Brief pp. 2-3)

[5] The facts in this sentence are not in the record because they occurred in the bankruptcy court after the entry of the Tenth Circuit's mandate but before the Petition for Writ of

The Edwards County, Kansas sheriff conducted a sale of the real property in issue on November 27, 1990 and reported that the Bank was the highest and best bidder. On the same date, the Bank filed its motion to confirm the sale, to which the Johnsons objected on December 14, 1990. The motion to confirm the sale and the Johnsons' objection thereto came before the Edwards County District Court on December 19, 1990 at which time the court confirmed the sale. An order to that extent was entered on January 2, 1991. On January 9, 1991, the Johnsons filed their notice of appeal from the decision of the Edwards County District Court to the Kansas Court of Appeals. The case in the Kansas Court of Appeals was docketed on January 22, 1991.[6]

On January 22, 1991, this Court granted Johnson's Petition for Writ of Certiorari.

During the pendency of the bankruptcies and the appeals, Johnson has remained in possession of the property and has received virtually all income from the farming operation. The only payments made by Johnson to the Bank pursuant to the plan confirmed by the bankruptcy court have been the initial $10,000.00 due on December 1,

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Certiorari was granted; but these facts are not disputed. They are included here because of the mootness issue raised by the Bank. (Res. Supp. Brief pp. 2-3)

[6] The facts described in this paragraph are not in the record because they occurred in the foreclosure action pending in the state court after the Tenth Circuit's decision; but these facts are not disputed. They are set forth here to give the Court a full understanding of what has transpired in this case between the Tenth Circuit's decision and now, and because of the Bank's allegation that the case is moot. (Res. Supp. Brief pp. 2-3)

1987 and the monthly oil and gas proceeds delivered by the producers to the Bank. Johnson did not attempt to negotiate a reaffirmation of the Bank's indebtedness discharged in the Chapter 7 bankruptcy. Johnson would not have been eligible to file a Chapter 13 bankruptcy but for the discharge of his unsecured debts in the prior Chapter 7 bankruptcy.[7]

H. Summary of Argument

The decision of the court below must be reversed because (1) the clear language of the Bankruptcy Code is contrary to the court's decision and (2) the court's decision does not logically compare with similarly situated parties who would clearly be entitled to bankruptcy relief.

The term "claim," defined at §101(4), was broadly defined by Congress. The lower court's narrow construction of the "right to payment" element in the definition of "claim" is not consistent with other provisions in the Bankruptcy Code which recognize that a "payment" can be made by transferring property owned by a debtor to a creditor. The lower court's requirement that the payment be made *from the debtor* adds an additional element to the definition of "claim" which Congress did not contemplate. Further, the lower court's restricted interpretation of the term "payment" ignores the term's common and ordinary meaning. Lastly, the lower court's decision whitewashes the clear language of §102(2) and stands on the legislative history (which has been used by courts to

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[7] These facts are not in the record, but are not disputed.

support decisions reaching the opposite conclusion), shunning the Congressional intent embodied in the clear statutory language.

The legal rights the Bank has against Johnson (to seize and sell his farm land) are no different than those rights many other lenders have against debtors where the lender may only satisfy its debt from the sale of its collateral. Yet, it is inconceivable that debtors in those situations should be precluded from bankruptcy relief, if necessary. While many courts have held that lenders in the same situation as the Bank have no "claim" against a debtor who has discharged his/her *in personam* debt in a prior Chapter 7 bankruptcy, these courts have not clearly reviewed the definition of "claim," the rule of construction in §102(2), and their use throughout the Bankruptcy Code. Such decisions confuse the question of whether a "claim" exists with the issue of good faith found at §1325(a)(3). Since there is no logical distinction between the rights the Bank has against Johnson and the rights other lenders have against debtors where the only source of "payment" is from liquidation of collateral, there is no logical basis for a determination that the Bank has no "claim" against Johnson.

I. Argument

In 1978, Congress enacted the Bankruptcy Code (sometimes hereinafter "the Code"), repealing the Bankruptcy Act of 1898.[8] In so doing, Congress for the first

[8] *See* Pub.L. 95-598, 92 Stat. 2549 (codified at Title 11, United States Code (1978)).

time defined the term "claim" for the purpose of the entire Bankruptcy Code.[9] The term "claim" was broadly defined in the Bankruptcy Code and contemplated "all legal obligations of the debtor."[10] Congress also intended, and it is now well settled, that discharges granted under the Code were to relieve the debtor of all personal liability, but allow *in rem* liabilities on a debtor's property to survive the bankruptcy discharge.[11] Also of significance is that Congress specifically proscribed serial bankruptcy filings under certain circumstances, but did not specifically prohibit the filing of a Chapter 13 bankruptcy immediately following a Chapter 7 bankruptcy.[12] In the case at

[9] Under the Bankruptcy Act of 1898, the term "claim" was either not defined or was defined differently for different Chapters within the Act. *See* 2 *Collier on Bankruptcy*, 15th Ed., §101.04 (1990); §§1, 406(2) and 606(1) of the Bankruptcy Act of 1898.

[10] H.R. Rep. No. 595, 95th Cong., 2d Sess. 309 (1978), *U.S. Code Cong. & Admin. News* 1978, p. 6266.

[11] H.R. Rep. No. 595, 95th Cong., 2d Sess. 361 (1978); S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978); *U.S. Code Cong. & Admin. News* 1978, pp. 5787, 5862, 6317; *Lindsey v. Fed. Land Bank of St. Louis*, 823 F.2d 189, 191 (7th Cir. 1987); and *Chandler Bank of Lyons v. Ray*, 804 F.2d 577 (10th Cir. 1986). *See also*, analysis pertaining to amendment to §524(a)(2) by Bankruptcy Amendments and Federal Judgeship Act of 1984 Pub.L 98-353, 98 Stat. 333 (1984) at *Grundy National Bank v. Johnson*, 106 B.R. 95, 97 (W.D. Va. 1989).

[12] *See* §109(g), §727(a)(8) and §1141(d)(3). This is of particular significance since Congress is presumed to be aware of existing law when it enacts a new law which incorporates sections of a prior law. *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 870, 55 L.Ed.2d 40, 45-46 (1978) This Court specifically allowed a Chapter XIII debtor to file an "extension plan" having obtained a discharge in a straight bankruptcy within six years of the Chapter XIII filing, in *Perry v. Commerce Loan Company*, 383 U.S.

bar, the Court must determine whether Congress intended to define "claim" so broadly as to include the *in rem* liability which remains after a Chapter 7 discharge. It is apparent that Congress had that intent.

1. THE TERM "CLAIM" SHOULD INCLUDE AN *IN REM* RIGHT AGAINST A DEBTOR'S PROPERTY BECAUSE (a) THE CREDITOR HAS A "RIGHT TO PAYMENT" AND (b) CONGRESS INTENDED TO DEFINE "CLAIM" BROADLY.

This case presents for decision a question of statutory construction. In reaching a decision, the Court must construe the definitions of "debt"[13] and "claim."[14] This Court has recently held that because "claim" is used in defining "debt," the meanings of these terms are "coextensive." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126, 2130, 109 L.Ed.2d 588, 595 (1990).

392, 86 S.Ct. 852, 15 L.Ed.2d 827 (1966); reh'g. denied 384 U.S. 934, 86 S.Ct. 1441, 16 L.Ed.2d 535 (1966).

[13] The term "debt" is defined in the Bankruptcy Code at 11 U.S.C. §101(11) as follows: "debt" means liability on a claim.

[14] The term "claim" is defined in the Bankruptcy Code at 11 U.S.C. §101(4) as follows: "claim" means –

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Thus, Johnson concentrates on the definition of the term "claim" and its use throughout the Bankruptcy Code. In analyzing the term "claim," two fundamental rules of statutory construction should be observed. First, statutory construction begins with the language of the statute. *Landreth Timber Company v. Landreth*, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301, 85 L.Ed.2d 692, 697 (1985). Second, statutory construction is not to be conducted by isolating the particular statutory phrase at issue – it is a "holistic endeavor." *United Savings Ass'n. v. Timbers of Inwood Forest*, 484 U.S. 365, 371, 108 S.Ct. 626, 630, 98 L.Ed.2d 740, 748 (1988). Utilizing these two standards of construction, it is evident that the term "claim" includes the Bank's *in rem* liability which encumbers Johnson's property.

(a) The Bank Has A "Right To Payment."

In the decision below, the court determined that the Bank has no "right to payment" *from Johnson* and therefore the Bank has no "claim."[15] The decision is incorrect for a number of reasons.

First, the court expanded the language of §101(4) by adding that the "right to payment" required by the statute must be *from the debtor*. The statutory language does not dictate that the payment required necessarily be money flowing from the debtor; it simply requires that

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[15] *See* Pet. p. App. 7; 904 F.2d at 566. The court conceded that the Bank has a right to an equitable remedy "in the form of a state court foreclosure proceeding," but found no right to payment as necessary to satisfy the elements in either subsection (A) or (B) of §101(4).

there be a right to a payment.[16] The payment could be made by transferring the debtor's property to a creditor, a concept specifically recognized throughout the Bankruptcy Code.

In §1325(a)(5)(C), a debtor may confirm a Chapter 13 Plan by satisfying a secured claim through the transfer of the property which the creditor has as collateral. Section 363(k) allows a secured claimant to bid in and offset the amount of its claim (both the secured amount and the unsecured amount) at the sale of its collateral without paying any additional money. Thus, if such a creditor were the successful bidder, its claim would be satisfied or "paid" by receipt of the property.

Section 508 recognizes that a "transfer of property on account of a claim" in a foreign proceeding should be accounted for in a bankruptcy proceeding on the same claim – expressly recognizing that a transfer of property constitutes a payment. Section 502(d) disallows a claim to the extent the claimant is in possession of property which is recoverable by the bankruptcy estate under one of the avoidance provisions – essentially offsetting the estate's claim against the creditor's claim. Accordingly, the Bankruptcy Code recognizes in a number of places that a payment can be made by transferring property. The term "payment" does not require that money must be paid by the debtor.

Additionally, the lower court's decision that the Bank has no "right to payment" ignores the common meaning

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[16] *See In Re Ligon*, 97 B.R. 398, 403 (Bankr. N.D. Ill. 1989) for a proper analysis of the "right to payment" requirement.

of the term "payment."[17] The term "payment" is defined in *Black's Law Dictionary* 1016 (5th Ed. 1979) as follows:

> Payment is a delivery of money or its *equivalent in either specific property* or services by one person from whom it is due to another person to whom it is due. [Citation omitted] A discharge in money *or its equivalent* of an obligation or debt owing by one person to another, and is made by debtor's delivery to creditor of money *or some other valuable thing*, and creditor's receipt thereof, for purpose of extinguishing debt. [Citation omitted] (Emphasis added).

It cannot seriously be argued that the Bank's mortgage rights were not intended by the parties to be a form of payment. The entire concept of security for a loan is providing an alternative means of payment if the debtor is either unwilling or unable to otherwise pay the debt. Certainly, the Bank has the right to receive the land it has mortgaged from Johnson and the Bank has, from the inception of the case, been receiving the oil and gas proceeds from Johnson's land in "payment" of a portion of Johnson's debt.

In addition, the court below ignored the method by which property is sold by execution in Kansas, as well as Johnson's redemption rights after the property is sold. The Bank also has a right to payment arising from those events. Under Kansas law, when a mortgagee forecloses on mortgaged property, the property is sold at a sheriff's

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[17] "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199, 204 (1979).

sale. At the sheriff's sale, a bidding process is utilized. Under this procedure, the Bank could be paid the full amount of its judgment by a person or entity making a higher bid at the sale.[18] Thus, under Kansas law, it is possible that the Bank could be paid by a higher bidder at the sheriff's sale. As such, it has a right to payment.

Additionally, under Kansas law, a mortgagor is given a period of six months to a year to redeem real property sold at a sheriff's sale.[19] That procedure allows a debtor to redeem foreclosed property by paying the successful bidder at the sheriff's sale the amount bid, plus interest, costs and taxes. Thus, under Kansas law, even after the property is sold at a foreclosure sale, the Bank still has a right to payment if the debtor redeems the foreclosed property.[20]

Lastly, in making its decision, the court below did not consider the tax treatment of the sheriff's sale of Johnson's property as it bears on the issue of payment. When Johnson's property was sold at the sheriff's sale, the treasury regulations, as applied by the Internal Revenue Service, require that Johnson treat the transaction as a taxable sale for which a gain is recognized in an amount

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[18] *See* K.S.A. 60-2410; and *Home State Bank v. Johnson*, 240 Kan. 417, 425, 729 P.2d 1225, 1231 (1986).

[19] *See* K.S.A. 60-2414.

[20] This is one of the issues now on appeal in the Kansas Court of Appeals where the Johnsons argue, in part, that the Bank improperly bid at the sheriff's sale thereby improperly increasing the amount the Johnsons must pay to redeem their land.

equal to the excess of the fair market value over Johnson's basis in the property. Debt forgiveness income would also be recognized to the extent the amount bid exceeds the property's fair market value.[21] On the other side of the transaction, the Bank receives a "payment" in an amount equal to the fair market value of the property, and is entitled to a bad debt deduction to the extent its bid exceeds the property's fair market value.[22] Accordingly, the Internal Revenue Service recognizes that a "payment" has been made.

For all of the above reasons, it is apparent that the Bank has a right to payment as required by §101(4) and that the lower court's decision to the contrary should be reversed.

(b) The Use Of The Term "Claim" Throughout The Bankruptcy Code And Other Provisions In The Bankruptcy Code Demonstrate Congress' Intent To Define "Claim" Broadly Enough To Encompass *In Rem* Liabilities.

When Congress enacted the Bankruptcy Code, it defined certain terms to be used throughout the Code. One of those terms is "claim." Congress' decision to provide a pervasive definition of "claim" to be used in all Chapters of Title 11 was a departure from the scheme existing under the 1898 Act.[23] Therefore, one must

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[21] Treas. Regs. §1.1001-2(c), Ex. 8.

[22] Treas. Regs. §1.166-6(b).

[23] "Congress fundamentally restructured bankruptcy law by passing the new Bankruptcy Code." *Begier v. IRS*, 495 U.S.

assume that the use of the term throughout the Bankruptcy Code was part of a design by Congress to create uniformity with regard to what would constitute a valid "claim" in bankruptcy – no matter how the claim arose or the Chapter in which the action may be pending. From a review of some of the basic provisions in the Bankruptcy Code, it is evident that Congress intended that an *in rem* liability against a debtor's property be a "claim" in bankruptcy.

Section 502(b)(1) provides that claims in a bankruptcy proceeding will be allowed unless the "claim is unenforceable against the debtor *and property of the debtor*" under an agreement or the law. (Emphasis added) Thus, a claim is allowable if it is enforceable against the debtor or his property.

The automatic stay provisions of §362, one of the mainstays of bankruptcy relief, also support the notion that an *in rem* liability against a debtor's property constitutes a "claim" for bankruptcy purposes. Under subsections (a)(2) and (3), all entities are stayed from the enforcement of a judgment obtained before bankruptcy and from any act to obtain possession of or control over property of the estate. Property of the estate is broadly defined at §541(a)(1) as "all legal or equitable interests of the debtor in property" as of the bankruptcy filing. Therefore, unless liabilities imposed on a debtor's property are "claims" for bankruptcy purposes, the above provisions would be superfluous.

___, 110 S.Ct. 2258, 2265, 110 L.Ed. 46, 59 (1990); *United States v. Ron Pair Enterprises*, 489 U.S. ___, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290, 297 (1989). *See also*, n. 11, p. 15, *supra*.

As this Court has recognized,[24] the legislative history of §104 indicates that Congress intended the term "claim" to be construed broadly. Congress enacted "the broadest possible definition . . . contemplat[ing] that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court." *See* H.R. Rep. No. 595, 95th Cong., 2d Sess. 309 (1978); S. Rep. No. 989, 95th Cong., 2d Sess. 22 (1978); *U.S. Code Cong. & Admin. News* 1978, pp. 5787, 5808, 6266. Nothing in the Bankruptcy Code indicates that Congress intended to limit that "broad relief" by prohibiting an *in rem* liability encumbering a debtor's property after a Chapter 7 discharge from being included in the definition of "claim."

2. SECTION 102(2) EXPRESSLY ALLOWS AN *IN REM* LIABILITY AS A CLAIM.

The clear language of §102(2), which provides that a " 'claim against the debtor' includes [a] claim against property of the debtor," seems to dispose of the issue here presented. The court below, however, turned to the

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[24] *See Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126, 2130, 109 L.Ed.2d 588, 595-596 (1990); *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985). Johnson recognizes that Congress recently acted to limit the *Pennsylvania Dept. of Pub. Welfare* decision. *See* Criminal Victims Protection Act of 1990, Pub.L. 101-581, 104 Stat. 2865 (1990). However, it is significant to note that Congress did not act by limiting the definition of "claim" at §101(4), but simply provided that criminal restitution obligations cannot be discharged in Chapter 13 proceedings.

"statute's illuminating legislative history"[25] to determine that Congress did not mean what it said.[26]

In so doing, the court relies heavily on the language in the Senate Report which states that §102(2) is intended to cover nonrecourse loan agreements.[27] While Congress did not specify in either the Senate Report or the House Report what was meant by the phrase "nonrecourse loan agreements," it is generally understood to mean a transaction where the borrower is not personally liable for repayment of the debt and the lender may only look to its collateral for payment.[28] This is precisely the situation the

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[25] *See* Pet. p. App. 6; 904 F.2d at p. 566.

[26] The court apparently disregarded another age-old canon of statutory construction: the consideration of the legislative history of a statute is unnecessary where the language of the statute is clear and unambiguous. *United States v. Ron Pair Enterprises*, 489 U.S. ___, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290, 298 (1989); *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701-702, 66 L.Ed.2d 633, 638 (1981). As pointed out by Johnson in his petition (p. 8), the legislative history relied on by the lower court is as illuminating for other courts, but for the opposite conclusion. In *In Re Saylors*, 869 F.2d 1434, 1436 (11th Cir. 1989), the court quotes with approval a portion of the decision in *Matter of Lagasse*, 66 B.R. 41, 43 (Bankr. D. Conn. 1986), which reviews the same language quoted in the opinion below (with the exception that in *Lagasse* the court uses the House Report and in *Johnson* the court uses the Senate Report) to reach the opposite conclusion.

[27] *See* Pet. p. App. 5; 904 F.2d at pp. 565-566.

[28] *See Commissioner of Internal Revenue v. Tufts*, 461 U.S. 300, 302, 103 S.Ct. 1826, 1828, 75 L.Ed.2d 863, 867 (1983); *Raphan v. United States*, 759 F.2d 879, 885 (D.C. Cir. 1985); *In Re Dan Hixson Chevrolet Co.*, 20 B.R. 108, 111 (Bankr. N.D. Tex. 1982); and Blackburn, *"Important Common Law Developments for Nonrecourse Notes: Tufting It Out,"* 18 *Ga. Law Rev.* 1, n. 2 (1983).

Bank faces here. Since Johnson has discharged his personal liability, the Bank's only recourse is against its collateral.[29]

The court below emphasized that there was no "agreement" between the parties for a nonrecourse loan.[30] However, the parties' agreement unquestionably contemplated payment from the collateral if the Johnsons either could not or would not otherwise pay the debt. Thus the lower court's distinction is one without a significant difference; in either situation, the lender is left to collect its debt from its collateral.

Lastly, an examination of how the rule of construction at §102(2) is used throughout the Bankruptcy Code illustrates Congress' intent to include *in rem* debts within the definition of "claim." Utilizing the phrase "claim against property of the debtor" instead of the phrase "claim against the debtor," as provided by §102(2), the following Code sections could be read as follows:

Section 362(a)(1)

> [A] petition filed under . . . this title . . . operates as a stay, applicable to all entities, of –

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[29] Indeed, several courts, including the bankruptcy court in the case at bar, have held that a debtor's discharge of a secured debt converts the debt relationship from a recourse loan to a nonrecourse loan. *See*, Pet. p. App. 28; *In Re Saylors*, 869 F.2d 1434, 1436 (11th Cir. 1989); *Grundy National Bank v. Johnson*, 106 B.R. 95, 98 (W.D. Va. 1989); *In Re Klapp*, 80 B.R. 540, 542 (Bankr. W.D. Okla. 1987); *Matter of Lagasse*, 66 B.R. 41, 43 (Bankr. D. Conn. 1986).

[30] *See* Pet. p. App. 6; 904 F.2d at 566.

(1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding . . . to recover a [claim against property of the debtor] that arose before the commencement of the [bankruptcy].

Section 362(a)(6)

[A] petition filed under . . . this title . . . operates as a stay, applicable to all entities, of –

(6) any act to collect, assess, or recover a [claim against property of the debtor] that arose before the [bankruptcy].

Section 362(a)(7)

[A] petition filed under . . . this title . . . operates as a stay, applicable to all entities, of –

(7) the setoff of any debt owing to the debtor . . . against any [claim against property of the debtor.]

Section 1322(a)(8)

The plan shall –

(8) provide for the payment of all or part of a [claim against property of the debtor] from property of the estate or property of the debtor.

If any of the above provisions in the Bankruptcy Code are to have any substance, a "claim" must include *in rem* rights against a debtor's property.

3. LOGIC AND REASON REQUIRE THAT *IN REM* LIABILITIES BE INCLUDED IN THE DEFINITION OF "CLAIM."

While a review of the statutory language, the application of rules of construction, and an understanding of the

legislative history of the statutory provisions in question are necessary to a determination of this case, it is equally necessary that the Court's decision be logical and based on sound principles of common sense. The position urged by Johnson satisfies these necessities.

(a) Other Lending Arrangements Which Result Only In *In Rem* Liabilities Should Be "Claims" For Purposes Of Bankruptcy Relief.

The legal rights the Bank has against Johnson are no different than the legal rights a lender has against a parent who has pledged property (with no *in personam* liability) as security for a child's debt. In both cases, the lender simply has rights against property. Yet, it would be inconceivable that a parent in that situation should be precluded from bankruptcy relief by a narrow interpretation of the definition of "claim."

Similarly, in those states that have antideficiency statutes[31] which prevent a creditor from obtaining a deficiency judgment so that the creditor may only pursue its collateral for payment of its debt, such a creditor stands in the same shoes as the Bank in the case at bar. But no reasonable person could suggest that the borrower in such a situation should be precluded from bankruptcy relief, if necessary, simply because the creditor may only pursue the debtor's property. And, of course, in those situations where nonrecourse loan agreements are

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[31] E.g., §5-103, Uniform Consumer Credit Code.

entered into in the first instance, Congress has specifically stated that such arrangements constitute "claims" within the meaning of the Bankruptcy Code.

There is no logical basis to explain the disparity of treatment between each of the examples set forth above and the situation at bar – the rights between the lender and the borrower are the same. The fact that the cited examples occur before a bankruptcy filing and the situation *sub judice* occurs as a result of a bankruptcy filing, does not change the essential relationship between the parties and should have no bearing on the question of whether a "claim" exists.

While not many courts have stated as much, it is likely that most courts which have held for the lender on the issue presented here have done so because they are offended by the serial bankruptcy filings and the perceived abuse of the bankruptcy process. These courts have confused the issue of whether a "claim" exists with the requirement that Chapter 13 plans be proposed in good faith.[32] This Court should correct that confusion. All indications from the language contained in the bankruptcy code are that the Bank has a "claim" against Johnson. Abuses of the bankruptcy process can be checked by application of the good faith standard.[33]

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[32] *See Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987) and *Matter of Hagberg*, 92 B.R. 809 (Bankr. W.D. Wis. 1988) for examples of cases which have correctly examined the "claim" issue, but reached opposite conclusions on confimation based on the good faith analysis required by §1325(a)(3).

[33] It should be noted that after Johnson filed his Chapter 7 bankruptcy, Congress recognized the need for special legislation in bankruptcy for farmers and enacted Chapter 12. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub.L. 99-554, 100 Stat. 3088 (1986). Since at the time Johnson filed his Chapter 7 bankruptcy he was not eligible for Chapter 13 relief and relief under Chapter 11 would likely have been futile due to the absolute priority rule (*see* 11 U.S.C. §1129(b)(2)) and the 1111(b) election, both of which were eliminated in Chapter 12 proceedings, there is a justification for Johnson's subsequent Chapter 13 filing.

Lastly, the court below, the district court, and several other courts,[34] have held that if the relief sought by Johnson were permitted, it would amount to forcing an involuntary, unilateral reaffirmation agreement on the Bank. Such a holding misconstrues the effect of a reaffirmation agreement. A reaffirmation agreement entered into pursuant to §524(c) has the effect of establishing the parties' rights as if a bankruptcy had not been filed. Thus, in Johnson's case, it would have reestablished the *in personam* liability Johnson owed to the Bank in an amount equal to the amount that was owed prior to the Chapter 7 bankruptcy. While a reaffirmation agreement cannot be made unilaterally by the creditor or the debtor, the effect of Johnson's Chapter 13 bankruptcy is not to reinstate the parties to their prebankruptcy relationship, rather, it is to allow Johnson to pay the Bank the value of its security (without regard to the total amount owed prior to bankruptcy), with interest, over a period of five years. Under the Bankruptcy Code, a debtor is specifically allowed to force a creditor to accept such treatment.[35]

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[34] *See* Pet. pp. App. 6 and App. 19; *In Re Russo*, 94 B.R. 127, 129 (Bankr. N.D. Ill. 1988); *In Re McKinstry*, 56 B.R. 191, 193 (Bankr. D. Vt. 1986); *In Re Binford*, 53 B.R. 307, 309 (Bankr. W.D. Ky. 1985); and *In Re Brown*, 52 B.R. 6, 7 (Bankr. S.D. Ohio 1985).

[35] *See* §1325(a)(5)(B), §1225(a)(5)(B) and §1129(b)(2)(A).

J. Conclusion

For all of the above reasons, Johnson respectfully requests that the Court reverse the decision of the court below and remand the case to the district court for further proceedings on the undecided issues raised by the Bank in its appeal from the bankruptcy court.

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